FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 1 1947
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 564

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Petitioner,

v.

THE GENERAL INDUSTRIES COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

GLEN O. SMITH,
M. REESE DILL,
CARL F. SHULER,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

INDEX.

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statute Involved 3

Argument 4

The Three Foremen Engineers are Exempt, Executive Employees 4

The Foremen Engineers Have Received Adequate Compensation for Overtime 12

Conclusion 13

TABLE OF AUTHORITIES.

Cases.

Axel Langnes v. Green, 282 U. S. 531 2

Public Service Commission of Puerto Rico v. Havermeyer, 296 U. S. 506 2

Walling v. General Industries Co., 60 F. Supp. 549, 155 F. 2d 711 4

Statutes.

Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201 *et seq.*):

Section 7(a) 3

Section 13(a) 2, 3

Section 15(a)(3) 15

Judicial Code, Section 240 (a) 1

Regulations.

Regulations of the Administrator of the Wage and Hour Division of the United States Department of Labor, Section 541.1 2

In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 564

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
Petitioner,

v.

THE GENERAL INDUSTRIES COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 137-141) is reported at 60 F. Supp. 549. The opinion of the Circuit Court of Appeals (R. 159-164) is reported at 155 F. 2d 711.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 28, 1946. (R. 159.) A petition for rehearing was filed on June 17, 1946 (R. 165-174), and denied on July 8, 1946. (R. 176.) The petition for a writ of certiorari was filed on October 3, 1946, and granted on November 12, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Upon trial, the District Court found that the three Foremen Engineers, Page, Spooner and Stegman, were exempt employees under the provisions of the Fair Labor Standards Act of 1938 by virtue of Section 13 (a) of said Act and Section 541.1 of the Regulations of the Administrator of the Wage and Hour Division of the United States Department of Labor, hereinafter referred to as the "Act." (R. 152.)

The Court also found that the three Foremen Engineers were properly compensated under the Act even though considered non-exempt, thus finding against the Administrator on both grounds. (R. 150.)

The District Court found that the Assistant Paymaster Payne was also exempt under the Act. (R. 152.) Since these four employees were the only ones whose status was questioned, the injunction sought by the Administrator against the Respondent was denied. (R. 153.)

The Circuit Court affirmed the District Court in denying the injunction holding that the Assistant Paymaster was exempt and that the three Foremen Engineers though non-exempt had been properly compensated under the Act. (R. 159 to 164.)

Respondent contends that the finding of the Circuit Court that the three Foremen Engineers are non-exempt employees cannot be supported by the facts or the evidence in the case and there is no justification for the reversal of the finding of the District Court on this subject. The question is properly before this Court for consideration even though Respondent did not apply for certiorari. *Axel Langnes v. Green*, 282 U. S. 531; *Public Service Commission of Puerto Rico v. Havermeyer*, 296 U. S. 506.

Thus, the questions to be determined are:

(a) Was the finding of the District Court that the three Foremen Engineers were exempt employees

based upon proper and sufficient evidence and not contrary to the law?

(b) Was the Circuit Court justified under the facts or the law in reversing the District Court findings on this subject although affirming the final judgment?

(c) The question as to the adequacy of compensation of the three Foremen Engineers only becomes pertinent and necessary should they be determined to be non-exempt employees.

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201, *et seq.*) are as follows:

"Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce"

* * * * *

"(3) For a work week longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

Sec. 13 (a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator) * * *."

ARGUMENT.

THE THREE FOREMEN ENGINEERS ARE EXEMPT, EXECUTIVE EMPLOYEES.

The Respondent is located in Elyria, Ohio and at the time herein mentioned employed more than 1,700 people. (R. 5.) It is engaged in the manufacturing of plastic and metal machine products, being one of the major producers of plastic products. (R. 5.)

To properly determine and decide the questions presented here, the nature, extent and importance of the Power Plant and its employees must be understood. Accordingly, we quote from the testimony of O. W. Marsh, Vice President and Works Manager of the Respondent. There is other testimony supporting this, but not one word to vary or deny.

"Q. As works manager down there you are familiar with the power plant of the General Industries Company?

A. Yes, sir.

Q. Would you just briefly describe the functions of it and the equipment, and so forth?

A. Well, we are one of the few concerns in this area that manufacture their own electric power as well as high pressure steam. We are in the plastic business, and as well as steam we use a tremendous amount of air. We have four boilers, just about go into this room, and we have four engines that generate this DC power which we use. Through all these years that I have been there we have always felt that this power plant was one of the most important departments we had in our plant, not only from the angle of investment but the lives at stake if anything should happen in this plant. We might not only blow ourselves to pieces but perhaps a quarter of Elyria. It is not just simple machinery. These engines run probably $40,000 a piece. Of course, they have a very heavy base. It is a lot different than the ordinary factory that buy their power and have a stationary engineer that works with low pressure steam for heat-

ing and plating and simple work. We are one of the few in this area that manufacture our own power.

Q. Would you just say something in connection with the importance of steam in your molding of plastics and pressure necessary?

A. Well, 150 pounds pressure, of course, is generally away above that used in any manufacturing business, but in this plastic industry we require that high pressure in order to get the heat units that is necessary to transform this plastic material into final shape.

Mr. Ditto: If it will save any time, we could stipulate the employees have an important mechanical job, and we have no intention of belittling their type of work.

The Court: It is in now and is not disputed so you need spend no more time or call another witness.

The Witness: Might I just say this, your Honor? Sometimes in the past I can recall where perhaps one of these workmen would come in, and let's say slightly under the influence of liquor. We hold these engineers responsible to either send that man home or at least get in touch with somebody, even if we have to go to the president, because they are in a very dangerous position, not only for damage to property but loss of lives." (R. 109-110.)

On account of the nature of the business it is necessary to operate the Power Plant around the clock at least six days per week. (Fdg. 9, R. 149.) This is done by three shifts per day. (Fdg. 9, R. 149.) In charge of the Power Plant is a Chief Engineer subject to call at all times in emergencies, and three Foremen Engineers, one of whom is in charge of each of the three shifts. (Fdg. 9, R. 149.) There are a number of firemen and coal passers employed on each shift. (Fdg. 9, R. 149.)

From the very beginning of the Company's operation these firemen and coal passers were under the jurisdiction

and supervision of the Foremen Engineers. (R. 94.) The Chief Engineer and the three Foremen Engineers are the only supervision the Company has in the Power Plant for the twenty-four hour service and they had always been recognized as foremen and had received all the special benefits thereof, such as unlimited sick leave, and more liberal insurance and vacations, etc., which special benefits were only available to the supervision. (R. 94, Fdgs. 5, 6, 7, R. 145 to 148.)

All went well in the Power Plant until the latter part of 1939 when the International Brotherhood Firemen, Oilers & Helpers Union, Local 198 of Elyria, Ohio, demanded that, among other things, its bargaining unit under its contract be enlarged to include the Foremen Engineers, —up to this time only the firemen and coal passers were eligible. (R. 93.)

Incidentally, the Respondent in the operation of its plant is blessed with four different unions, each having separate bargaining units and often competing and not too friendly with each other. (R. 93.)

The problems on this subject with Local 198 are set forth in the testimony of Mr. Glen O. Smith who handled the negotiations on behalf of the Respondent. Nowhere in the record is his testimony contradicted or refuted. We quote:

> * * * "Well, when Mr. Seitz and I got together in connection with his demand for a contract for all of the powerhouse employes, the first and most difficult problem when we met was the question of these engineers. Mr. Seitz and his union insisted they were not supervisory employees or foremen and that therefore they belonged to the union. The Company took the position these engineers were supervisors, had always been supervisors, and were the only supervision they had in their powerhouse, and that accordingly, under the law, they could not belong to the union.

Well, that caused a lot of serious trouble. It was difficult to resolve the union's point of view and the company's point of view, but, under threat of strike, stopping of the powerhouse which would stop all of the plant—which had happened sometime previous to this—the company finally made this kind of concession on this question: that if the engineers wanted to belong to the union the company would shut its eyes to that fact and waive that question, with this proviso which was written into the contract. The contract, in general, under the representation clause, said that the union would represent all of the employees in the powerhouse except supervisors, and then there was a clause put in which indicated that the question as to whether or not a man was a supervisor would be determined finally as between the parties by the National Labor Relations Board.

That contract was executed, as I remember, in September of 1940. It was a contract for a year." (R. 93-94.)

* * * * *

The Witness: Well, we executed this first contract in September, 1940 for a year.

Four or five months later Mr. Seitz came to me complaining bitterly about the fact not all the engineers were joining his union, and it was causing a great deal of friction in the powerplant; that the firemen refused to take orders from the engineers unless they did belong to the union, and unless that thing was resolved and straightened out they were going to pull the fires. That, plus the fact of overtime. He raised the question with me again, insisting that due to the fact the engineers were on an hourly rate of pay, that they weren't supervisors.

Well, that opened the door to a possible way of restoring peace in the powerhouse. We sat down and negotiated a new contract, some time the early part of 1941, although the other contract had not yet expired, and in that contract we put the same language in with reference to the question as to whether they were or were not supervisors, but we negotiated a salary rate for the engineers. We took the engineers off of the hourly rate.

Mr. Reynard: May I enter an objection? If there is a salary arrangement in the contract we should have the contract.

(Further argument.)

The Witness: Well, for the benefit of the record I am perfectly willing. I have before me all four of the contracts we have executed with this union, they are copies. I am perfectly willing to offer them into the record and to counsel for the Government.

The Court: Let counsel examine them. Proceed.

A. (Continued) As a result of that, we executed a new contract dated March, 1941, and the basis of this new contract was that we put all of the engineers on a salary basis, and we also reduced the numbers of hours that the engineers had been working. If I remember they had been working an average of about 56½ or 57 hours per week. We negotiated a cut in those hours, I think down to 51 or 51½ hours per week, and agreed on a salary per month of $185, which salary was to include all overtime, and the pay for the regular scheduled work week which was 51 or 51½ hours.

Now that rate of pay, as I remember it, was definitely negotiated with Mr. Seitz, the business agent of the union, with myself, and following that negotiation and agreement, the shop committee from the powerhouse and Mr. Marsh came up to Cleveland and met with Mr. Seitz and me, at which time we signed this agreement. That was done in my office.

It might be interesting here to note that all through these negotiations and all our dealings with this union, although the union insisted the engineers could belong to the union, at no time did we ever have an engineer on the shop committee. No engineers were ever on that shop committee, and as a result it created a difficult problem in the powerhouse.

Now following this negotiation in March of '41, we have had many negotiations with Mr. Seitz, representing the union, and the shop committee, and up until this past summer this question of whether or not the engineer was a supervisor or not was always pres-

ent. The union never took the problem definitely to the National Labor Relations Board for a decision. It was a current problem all that time until this past summer when the union signed our last contract. They waive the right to represent the engineers, and we drew a contract which represents, or which is representative for all of the employees in the powerhouse except the engineers. So that under the present contract the union does not represent the engineers, although I still understand either one or two of them still belong to the union." (R. 95-96.)

In brief, this whole controversy came from a union program of duress to force the Company to compel and permit the Foremen Engineers to join the union and become part of their bargaining unit. The strategy was two-fold—to threaten strike and close the whole plant, and to have the firemen and coal passers refuse to take orders from the Foremen Engineers.

This created a very serious problem in addition to the threat of a strike closing the whole plant. The big problem was, do production workers in any department have a right under any law, or strained construction thereof, to take the position that they will not submit to or be amenable to the supervision provided by the Company unless and until that supervision joins the union of their, the production workers, choice?

To have conceded this at that time the Company would have been confronted with the same problem in all its other departments, including those being bargained for by three other unions. Clearly, this would have created an impossible situation.

The Company in this difficult position, adopted a very fair and proper alternative. It insisted that it was entitled to and always had had supervisors in the Power Plant; that the engineers constituted that supervision; and that it was the duty and obligation of the engineers to supervise and for the firemen and coal passers to accept the same.

During the next three years while the dispute was in abeyance the Respondent never receded from its position and the Union did not press the matter before the National Labor Relations Board. (R. 96.) At least one of the Foremen Engineers, Page, joined the Union (R. 46) and another, Spooner, was not sure whether he belonged to the Union or not. (R. 59.)

The next development took place July 25, 1944 when the Foremen Engineers were receiving monthly salaries in excess of $200.00, five hours of straight time overtime allowed as a maximum wage increase by the Salary Stabilization Unit of the United States Treasury Department, unlimited paid sick leave, and all the other perquisites given to supervisors. (Fdgs. 5, 6, 7, R. 145 to 148.) Desiring to retain the benefits of supervisors and end the dispute, the three Foremen Engineers on their own behalf entered into a new signed and written agreement with the Respondent reading as follows:

> "We, the undersigned, choose from henceforth to be regarded as Foremen, as in the past, with Foremen privileges and continue on a salary basis." (Fdg. 10, R. 151.)

Within a few days after the Foremen Engineers decided to abandon their dual position, the Union conceded that the Foremen Engineers were supervisors and not eligible to be included with the firemen and coal passers in the bargaining unit. (Fdg. 10, R. 151.)

But as the Union laid down the cudgel the Administrator took it up and, on the sole basis that the Foremen Engineers said to him that they did not supervise anybody, he now claims they are non-exempt.

Under these undisputed facts, how can the Administrator be heard to say that these Foremen Engineers are non-exempt because they did not supervise anybody? Just because a group of production workers temporarily decide, for union reasons, not to accept supervision they cannot

thereby disqualify that supervision, certainly not as long as that supervision is maintained, kept on a job, paid, and not displaced. The only evidence offered by the Administrator on this subject was some of the engineers themselves. The essence of their testimony was that they neglected their responsibility as Foremen Engineers because the firemen and coal passers refused to take orders from them, and followed the dual self interest that they would like to keep all of the benefits and prerogatives of a Foreman Engineer and also the benefits, if the Administrator could compel it, of a non-exempt employee. (R. 41 to 72.)

It is almost unbelievable, but nevertheless true, that after the Administrator knew or was advised of most of the facts recited he filed his action against this Respondent seeking the extraordinary remedy of a permanent injunction. This action was based upon an affidavit secured by a youthful and inexperienced inspector without even inspecting. (R. 30.) The record shows that he never went to or entered the Power Plant—and no other agent of the Administrator has seen fit to do so either—but instead accepted the self serving declarations of the Foremen Engineers "that they did not supervise anybody." (R. 39.) Apparently, that was enough to satisfy him and the Administrator. The Company's problem, the temporary reason, or nature of the condition was of no importance or consideration. Likewise, this same inspector offered his affidavit in the case of the Assistant Paymaster Payne. (R. 9 to 11.) This, after the Respondent Company had written an accurate and detailed description f the job and duties of the Assistant Paymaster to the Administrator and asked for a determination as to whether or not said employee was to be classified exempt or non-exempt. (R. 17.) Curiously enough, the very attorney who tried this case below answered that inquiry and advised the Respondent that from the facts stated in the letter in his opinion the

employee should be classified "*exempt.*" (R. 17.) That was done. That letter of the Respondent is in the record and at no time or place did the Administrator or his counsel try to attack or impugn the accuracy thereof. Even so, the opinion was reversed, or at least not adhered to by the Administrator, because the Assistant Paymaster's case was included in seeking injunctive relief against the Respondent. However, the two Courts below ruled that this employee was exempt, which apparently satisfied the Administrator since he has not included it in this case before this Court.

In the light of the uncontradicted and undisputed facts, we seriously and urgently insist that the Circuit Court erred in reversing the District Court in its finding that the three Foremen Engineers were exempt employees under the Act.

THE FOREMEN ENGINEERS HAVE RECEIVED ADEQUATE COMPENSATION FOR OVERTIME.

It is undisputed that Respondent had always treated the Foremen Engineers as exempt and hence that no effort has ever been made to compute their compensation within any rigidly prescribed formula. In fact, there was no *Belo* case formula approved by this Court when the negotiations with the Union were completed in 1941. It was only because of the Union's demand that the Foremen Engineers were put on a regularly scheduled 51 hour week and converted from an 80¢ hourly rate to a salary which Respondent agreed would be sufficient to pay for 40 hours of straight time and eleven hours of overtime at time and one half. (R. 95, 96.)

Respondent's only concern over this Court's affirmance or rejection of the doctrine of the *Belo* case is directed toward the principle of freedom of contract between employer and employee necessarily involved in that case. Respondent sought to reach agreement with the Foremen Engineers and the Union which purported to act for them in such a manner that their every interest would be pro-

tected without the sacrifice of basic management principles. It was for that reason alone that an allowance was made for overtime—not because Respondent felt it was required to do so and tried to devise a formula to circumvent the Act. If this Court affirms the doctrine of the *Belo* case and rules that Respondent has properly compensated the Foremen Engineers, as in the decision of the Circuit Court, it may be an equitable result financially, but Respondent will be faced with numerous practical supervisory problems to which there will be no solution.

CONCLUSION.

It must be remembered in considering this case that during the time herein mentioned our country was engaged in World War II and that the Respondent was engaged in a most important, urgent and "all out" war effort with many attendant problems. How the Respondent met its obligations is in the Record and speaks for itself.

The Foremen Engineers and the Union by scheming and conspiracy temporarily made it difficult for Respondent while they persisted in conduct designed to force Respondent to include them in the bargaining unit. There was no reason, nor is there a present reason, to continue that struggle after the July 25th, 1944 voluntary agreement that they had been supervising, were presently supervising, and would continue to supervise the Power Plant. The conflict between this simple agreement to supervise and their testimony as to their conduct from July 25th, 1944 until the time of trial, was considered and weighed by the District Court. Judge Wilkin found specifically that, despite some of their testimony to the contrary, the three Foremen Engineers did in fact supervise the firemen and the coal passers on their respective shifts as they were instructed to do by Respondent. (Fdg. 9, R. 149.) This finding is the crux of the case and under Rule 52 of the Rules of Civil Procedure should not be set aside unless clearly erroneous.

The Circuit Court in setting aside the District Court's finding said that the evidence is not contradicted that the Foremen Engineers could not "* * * give orders to any man in the boiler room." (R. 163.) *This is not the fact nor the evidence.* Not only were the Foremen instructed by Respondent to give orders to the men in the boiler room but they agreed in writing to do so. It is significant that the Administrator did not call any of the firemen or coal passers to testify on this subject but relied entirely on the self serving declarations of the Foremen Engineers.

The District Court ruled out Inspector Morgan's testimony about the Foremen Engineers when it developed during the trial that it was entirely hearsay. Similarly the District Court in ruling upon the credibility of the testimony of the Foremen Engineers disregarded their claim that in violation of their written agreement they did not give orders to the firemen and coal passers. The District Court in accepting as true the evidence of the Respondent that they did in fact give orders to the firemen and coal passers was fulfilling his function as the trier of the facts.

But entirely apart from the credibility of the witnesses the uncontradicted evidence substantiates the District Court. The absolute necessity for supervision around the clock, the vital and dangerous functions of the Power Plant, the long and difficult dispute with the Union and the Foremen Engineers, the receipt by the Foremen Engineers for years of all the perquisites of supervisors, their inclusion with other supervisors in the application for approval of salary increases, the admission by the Administrator that Respondent was entirely bona fide and consistent in its classification of and instructions to the Foremen Engineers —all clearly substantiates the District Court. Such evidence certainly refutes the Administrator's claim that the finding of the District Court was clearly erroneous.

In conclusion, the Respondent respectfully urges upon this Court consideration of the impossible situation created by treating the Foremen Engineers as non-exempt.

If the Foremen Engineers are non-exempt because they do not supervise, how can Respondent provide supervision? Must Respondent employ "Super Cargo" or must Respondent discharge and replace the present Foremen Engineers? If not, must Respondent put them back on an hourly rate, deprived of sick leave, and deprived of more liberal vacations and insurance, in order to avoid claims of inequities by other non-exempt employees? If given both the perquisites of an exempt employee and the overtime of a non-exempt employee all other exempt employees could claim an inequity. In addition, this pyramids their regular rate and creates an inequity in overtime payments compared to other non-exempt employees.

If the Foremen Engineers are discharged for refusing to follow instructions to supervise the Power Plant then Respondent may face charges of violating Section 15 (a) (3) of the Act reading as follows:

> "(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

If the Foremen Engineers are not discharged because they neglect their responsibility of supervising, the Respondent *will have no supervision in the Power Plant.* The management of the company would be grossly negligent if it permitted the operation of its Power Plant without supervision.

In addition to consideration of the inequities between employees, we urge consideration of the inequity forced upon the Respondent if they are considered non-exempt. After relying upon their Supervisors in the Power Plant and rewarding them for acceptance of this responsibility, Respondent would be compelled to use those rewards as a

basis of paying them an additional amount for neglecting their responsibilities. This cannot be the intent of the Act.

The only proper conclusion is that these Foremen Engineers are exempt. In fact, the Foremen Engineers are and have been supervising in Respondent's Power Plant to the satisfaction of the management and the other employees therein—yes, and to themselves, except that "they would like to have their cake and eat it too," that is, be exempt and non-exempt.

The Respondent respectfully submits that the finding of the District Court that the three Foremen Engineers are exempt employees should be affirmed by this Court, and the Circuit Court's decision reversing the District Court's findings on the subject should be reversed.

Respectfully submitted,

GLEN O. SMITH,
M. REESE DILL,
CARL F. SHULER,
Attorneys for Respondent.